

**Exploring the Punitive Surge:
Crown Court sentencing practices before and after the 2011 English riots¹**

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Keywords

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Abstract

The English summer riots of 2011 resulted in the criminal justice system having to process an unprecedented number of offenders in a short timeframe. This study explores sentencing practice in the wake of the riots using the 2011 Crown Court Sentencing Survey. A multilevel model was implemented to specify the probability of receiving a custodial sentence. This model allows exploring differences in sentencing before and after the riots. An increased probability of receiving a custodial sentence in the post-riot period was identified. An increase in variability was also detected, changing from a state of almost perfect consistency to a one in which substantial variation was observed between courts. Custodial rates for burglary increased to a level associated with more serious offences, thereby undermining the principle of proportionality. This, as well as the increased dispersion between courts, challenges other principles such as legal certainty and transparency.

Introduction

As is now well known, in early August 2011, riots¹ broke out across England. They started in London (Tottenham), arising from what were initially peaceful protests regarding the suspicious circumstances surrounding the death of Mark Duggan.² Social disorder quickly spread across a number of other cities including Birmingham, Bristol, Liverpool, Manchester and Salford. These events resulted in 3,103 prosecutions brought within the following year (Ministry of Justice 2012b) and associated costs estimated at around half a billion pounds, including policing, clean-up operations, damage to property, losses to business and lost tourism revenue (see Riots Communities and Victims Panel 2012). Newburn described the riots as the “*biggest civil disorder in mainland Britain in a generation*” (2015:39). Responding to the riots created a significant challenge for the criminal justice system, particularly at the most visible stage of the process, namely sentencing.

To date, there has been little research on this contested aspect of the riots, namely the sentencing of riot-related cases. The Ministry of Justice (MoJ) has published aggregate comparisons of sentencing trends for the post-riot period and a year before the riots (see Ministry of Justice 2011; 2012a; 2012b) and revealed an increase in sentence length. This finding was replicated in London by Bell et al. (2014). Lightowlers and Quirk (2015) analysed data from Greater Manchester while the only quantitative assessment of scale of the increase in severity in sentencing practice relating to the disorder of summer 2011 is reported by Bell et al. (2014). Lowenstein (2016) reports a qualitative analysis of sentencing remarks related to riot cases. Yet many sentencing-related issues remain to be explored, including the effects of the riot-related punitive uplift on proportionality and consistency. This article draws upon a new database to answer a series of questions arising from the Crown Courts’ response.

The unprecedented scale and numbers remanded and sentenced to custody, as well as the all-night court sittings, are key distinguishing features of the penal response to these riots (Newburn 2015). This response was driven by a political expectation that offenders ought to be processed rapidly and receive custodial sentences (Cameron 2011: Col. 1052) in order to make an example of those involved. The Crown Prosecution Service (2011)³ and Her Majesty’s Courts and Tribunals Service responded soon after suggesting public disturbances ought to be treated as an aggravating factor. Ultimately the court response had particularly punitive repercussions for thousands of defendants (McConville and Marsch, 2014). Setting a precedent, the Recorder of Manchester unilaterally established higher starting points and sentence ranges to be applied in the Manchester Crown Court (Carter and others 2011). Although not binding, his approach was adopted in other Crown Court locations (Alagago and others 2011; Twemlow and others 2011). The vast number of cases being prosecuted, the political pressure to be ‘tough’ on offenders, and the ad hoc guidance generated a confusing landscape for sentencing practice.

Ministry of Justice data on the processing of offenders brought before the courts in relation to the public disorder of August 2011 revealed an increase in the proportion of cases sentenced to immediate custody in the magistrates’ courts of 24% compared to similar offences in 2010, as well as an increase in the average custodial sentence length of 13.4 months for those sentenced in relation to the riots (Ministry of Justice, 2012b)¹. These findings suggest a ‘punitive surge’ took place (Roberts, 2013.

The uplift was demonstrated by empirical analysis of the processing of offenders through the criminal justice system from arrest to sentence (Lightowlers and Quirk, 2015) and further analyses of the MoJ data conducted by Bell et al. (2014). It is important to recognise how this ‘punitive surge’ could pose a challenge to the principle of ordinal proportionality, with sentences for these crimes exceeding in severity those imposed for more serious offences (see Roberts, 2013). If sentences were dramatically increased and without warning, this would undermine the principle of legal certainty. It might also affect the predictability of sentencing. Ultimately, this may weaken public confidence in the criminal justice system, and in particular amongst certain groups such as the young adults, the generation most affected by the riot litigation. Approximately three-quarters of the defendants brought before the courts for offences relating to the public disorder were under 24 years of age (Ministry of Justice, 2012b, Table 1a).

Commentary in the popular and professional media has been both supportive and critical of the courts’ response to the riots. Critics have argued that the punitive uplift was both excessive and too generalised – all offenders were subject to harsher sentencing without sufficient regard to individual circumstances and a consequence of the precipitate haste with which cases were resolved (see Nacro, 2011; Cooper, 2011; Mitchell, 2012; Roberts, 2012; Farrington, 2016; Jefferson, 2015). Another criticism is that the sentences imposed failed to adequately reflect personal mitigation, including factors such as age, absence of prior convictions and whether they were a carer for a relative. Finally, academics have argued that sentencing practices lost sight of both proportionality and parsimony, key principles in sentencing. Proportionality may have been lost when relatively minor offences attracted severe, and hence disproportionate sentences. Parsimony or restraint may have been undermined if courts disregarded the custodial threshold provision in the Criminal Justice Act 2003, by imposing a term of custody when a lesser sentence (or a suspended sentence) may have been adequate to achieve the objectives of sentencing. In this article we provide an empirical test for these assertions. Detailed research questions cannot be answered by aggregate data, such as those released by the MoJ. What is needed is a dataset which reflects the factors actually considered by the court at sentencing, and one capable of multivariate analyses to estimate the impact of specific factors while controlling for other case characteristics. By happy coincidence, a year before the riots the Sentencing Council inaugurated such a database.

The current study provides multivariate analysis of sentencing practice in relation to the summer riots 2011 drawing upon data provided directly by the sentencing authority: Crown Court judges and recorders. Our analysis employs national, representative data and controls for relevant legal factors, focusing on the offence most prevalent during the riots, namely commercial burglary. The current research addressed the following specific questions, relating to sentencing severity, consistency and proportionality:

1. How much harsher were sentences imposed in cases processed after the riots?
2. Did any punitive effect generalise to other, non-riot related offences committed at the same time?

3. Was the sentencing uplift in the post-riot period consistent across court locations?
4. Was there any change in consistency of sentencing following the riots?
5. Aside from severity and consistency, were there any other discernible shifts in sentencing practices in the post-riot period? For example, did courts pay less attention to mitigating factors, as claimed by practitioners?
6. What effect did the riots have on the principle of proportionality in sentencing?

Data

The analysis was carried out using the 2011 dataset of the Crown Court Sentencing Survey (CCSS) which captures offences sentenced at the Crown Court in 2011, with questionnaires being completed directly by judges after a sentence is passed. The level of detail used in defining the characteristics of the offence makes the CCSS a unique dataset in the field of sentencing. It captures information on: all the relevant mitigating and aggravation factors considered by the judge, the stage at which a guilty plea was entered, the criminal history of the offender, the specific type of offence being sentenced, the sentence outcome, and, crucially, an identifier of the court at which each offence was sentenced. Regrettably, before being released to external users, some of the information contained in the original CCSS was restricted for the sake of anonymity. For example, custodial sentence lengths were converted to intervals, thus transforming continuous variables into ordinal scales and reducing the level of detail available.⁴ Variables deemed to be more sensitive such as age or gender of the offender were dropped completely. Fortunately, the court identifiers for each of the 76 court locations in England and Wales were available in the first published version of the 2011 CCSS, which is used in the analysis that follows.

In spite of its aim to be a census of all Crown Court cases, the 2011 CCSS suffers from a 39% non-response rate (Sentencing Council, 2012). This is problematic since it represents a considerable loss of statistical power to detect any of the effects in the sentencing practice that we seek to investigate. More importantly, it is not possible to rule out the possibility that these cases were missing for a reason (i.e. missing not at random). The latter represents a limitation to the validity of the study and it will be discussed later in this article. The size of the dataset is nonetheless remarkable, comprising 56,481 cases of which 1,405 were offences of “burglary other than in a dwelling”, hereafter described as commercial burglary. Of these, 718 were sentenced from January to July, with the remaining 687 cases sentenced between August to December. In the analysis that follows these two groups will be compared to detect changes in the sentencing practice before and after the eruption of the riots.

Unfortunately, the CCSS does not indicate whether cases were related to the riots. Hence the need to rely on specific types of offences that were more common in the summer riots of 2011. The focus of this study is on burglary offences because they accounted for 50% of prosecutions related to the riots (Ministry of Justice, 2012b)⁵. Offences that represented a more marginal proportion of riot related prosecutions were discarded (e.g. violent disorder, which accounted for 22% of them), given the higher difficulty associated with disentangling genuine riot-related effects from any other sentencing trends. This limitation would be particularly problematic if considering cases of assault, since a new guideline dealing with these types of offence

became effective 13th June 2011, which would increase the possibility of different effects being confounded.

Analysis and results

Analytic strategies are adopted to first determine the degree to which severity changed in response to the riots. First, sentencing for cases of commercial burglary before and after the riots in courts processing riot cases (the ‘pre-post’ analysis) are compared. Second, any change is compared to changes in sentencing practices for a commercial burglary offence unrelated to the riots. Third, we compare sentences imposed for this offence in courts handling riot cases and other court locations where no rioting took place.

Offences heard between January and July 2011 and August to December 2011 are compared, due to further detail of the date of the offence being available in the CCSS. This relatively crude distinction will inevitably limit the effectiveness with which the research questions set out above can be answered. In particular, as a result of conflating cases of commercial burglary that were (signal) and were not (noise) related to the riots in the post-riot group the probability of committing a type I error is increased. That is, the capacity to detect any actual change in the sentencing practice will be reduced. On the other hand, the probability of committing a type II error are reduced here given the deliberate use of just cases of commercial burglary. Put differently, the probability of detecting an effect that did not actually took place, or was caused by an event other than the riots, is reduced by focusing on burglary offences which were the offence type most commonly associated with the riots. Lastly, it could be argued that the comparison of pre and post-riot groups, could be adding further noise since some of the offences captured in the latter group could be representing index offences that occurred before August. The CCSS does not indicate whether cases recorded represent index offences. However, the Sentencing Council (2012) in its CCSS 2011 annual publication indicated that 93% of the cases recorded represented principal offences, which limits substantially the extent of the problem.

Initial comparison of the bands of custodial sentence lengths reveal no change in severity from the pre to post riots period. As shown in Figure 1, the proportion of sentences longer than three years went down in the post-riots period, however, so did sentences shorter than six months, with only the bands encompassing more than six months to three years going up. Hence, it is difficult to identify a net effect attributable to the riots. It is more meaningful to examine the change in sentence lengths after the riots in light of the definitive guideline in force at that time (Sentencing Guidelines Council, 2008), summarised in Table 1 below. As can be seen, burglaries resulting in property valued under £2,000 were subject to a sentence range of a fine to 26 weeks custody. Almost all riot-related cases fell within this category, as the riots affected mostly clothing and food shops. In light of these assumptions, the most severe sentences (from three years upwards) may safely be ruled out as unrelated to the riots, and we can examine the extent to which the remaining bands of sentence length show an increase in severity.

Insert Figure 1, Table 1 here

The overall increase in severity following the outbreak of the disturbances can be clearly seen in the custody rate for non-domestic burglary which rose from 61.3% before the riots to 70.7% afterwards. A t-test for the difference between proportions confirms that this change is statistically significant ($p < .001$). In order to incorporate a ‘control’ offence, we compared sentencing in nondomestic burglary to another high volume offence less prevalent during the riots, namely robbery. No such increase in the use of custodial sentences was observed for this ‘control’ offence. This is shown in Figure 2, in which the monthly custodial rate for cases of burglary other than in a dwelling (black circle) and for offences of robbery (white circle) are plotted. The custodial rate for cases of robbery remains stable across 2011, whereas the custodial rates for offence of burglary other than in a dwelling are higher after August than before. These analyses confirm the aggregate increase in sentence severity following the riots. However, since this analysis covers the entire country, it is necessary to focus on the courts that actually sentenced riot-related cases.

Insert Figure 2 here

To refine the inquiry into the increase in severity following the riots, changes in custody rates within specific courts were also compared. Courts identified as having sentenced riot related cases were compared to those where none were sentenced. The list of court locations where riot related cases were sentenced was provided by the Ministry of Justice in response to a Freedom of Information request. Figure 3 shows the proportion of custodial sentences imposed before and after the disorders in different court locations. The 2011 CCSS identifies 75 court locations. However, to minimize unreliability in the estimations, only results for the 12 courts that sentenced at least 10 cases of commercial burglary both before and after the riots are shown. This analysis reveals a dramatic increase in severity in most⁶ of the courts where rioters were sentenced, with Manchester Crown Square and Wolverhampton doubling their custodial rate after the event of the summer riots (from 46.1% to 91.7% in the former, and from 45.4% to 90% in the latter)⁷. This effect is not observed in courts where no riots were sentenced. In fact, with the exception of Isleworth, these all showed a reduction in their custodial rates.

Table 2 presents comparative data for courts sentencing riot cases and those which had no riot related cases. Three offences are presented: commercial burglary; domestic burglary and robbery. As can be seen, the punitive uplift was seen only for commercial burglary and then only in court locations processing the riot-related cases.

Insert Table 2 here

Changes in Sentencing Consistency

Changes in consistency were also explored, using the standard deviation of custodial sentence lengths as our index of dispersion or spread. The standard deviations of custodial rates before and after the riots rose from 12.5% in the before-riot period to 20.7% in the post-riot period. That is, between court variability increased after the riots took place, as illustrated in Figure 3.

Insert Figure 3 here

The generalisability of these findings is limited since the analysis was based on only 12 of the 76 Crown court locations. Further analysis was conducted to ascertain any possible changes in sentencing dispersion as a result of the riots in a more reliable manner. Multilevel modelling techniques (also known as hierarchical or mixed models) were employed to do so. These types of regression models have been previously used in the literature to explore consistency in sentencing (Anderson, Kling & Stith, 1999; Anderson & Spohn, 2011; Pina-Sánchez & Linacre, 2013; and Pina-Sánchez, 2015). Their key advantage resides in their capacity to estimate the proportion of unexplained variability that is due to differences across courts while controlling for relevant case characteristics.

In particular, differences in cases due to 13 aggravating and mitigating factors considered in the guideline were controlled for. Perhaps the most important factor is the number of relevant previous convictions, measured a four-categories nominal variable (“none”, “1-3”, “4-9”, and ≥ 10 ”). The remaining twelve factors are measured as binary variables indicating their presence or absence in the case. Additional aggravating factors are: whether the offender was on bail; under the influence of alcohol or drugs, whether there was more than one victim, whether the victim was especially vulnerable, and whether the property subtracted was of high value. Potential mitigating factors comprise: age or lack of maturity of the offender, whether he or she showed remorse, whether addressing needs, suffering from physical or mental illness, coming from a difficult background, showed good character, or whether the sentence will impact on an offender’s dependency.

To make the most of the sample of 1,405 commercial burglary offences captured by the 2011 CCSS the model estimates the disposal type defined as a binary variable indicating whether the offender is sentenced to custody or not⁸. A generalised linear mixed model with a logit link function is specified.⁹ The model takes the following form:

$$y_{ij}^* = \alpha + (\beta_1 + \mu_{1j})x_{1ij} + \beta_l x_{lij} + \mu_{0j} + \varepsilon_{ij}$$

On the left-hand side of the equation y^* represents a latent continuous variable that underlines the binary y such that $y_{ij} = \begin{cases} 1 & \text{if } y_{ij}^* > 0 \\ 0 & \text{if } y_{ij}^* < 0 \end{cases}$, where i and j are subscripts used to index the sentence and court levels, respectively, so, $i = 1, 2, \dots, 1,384$ and $j = 1, 2, \dots, 67$. The right-hand side of the model is formed by a fixed and a random part. The former is composed of: an intercept, α ; a binary variable, x_{1ij} , labelled “riot”, capturing whether the offence was sentenced after August; its associated regression coefficient, β_1 ; a matrix of binary variables, x_{lij} , with $l = 2, 3, \dots, 15$, representing the relevant legal factors defining cases of burglary described above; and the regression coefficients, β_l , associated with each of these dummy variables. The random part of the model is composed of an error term, ε_{ij} , distributed as a standard logistic with variance approximately equal to 3.29 capturing the sentence-level unexplained variability, a random intercepts term, $\mu_0 \sim N(0, \sigma_{\mu_0}^2)$, capturing the court-level unexplained variability associated with the estimate of α , and a random coefficient, $\mu_1 \sim N(0, \sigma_{\mu_1}^2)$, capturing the court-level unexplained variability associated with the estimate of β_1 .

The random part of the above model can be used to detect and measure a potential change of consistency in sentencing without having to rely on comparisons of separate models for the before and after scenario, which would represent a division of the available sample size. This novel approach means that the existence of an increase in dispersion can be determined by testing the statistical significance of μ_1 . This is the random coefficient associated with β_1 , which is equal to zero for cases before the riots, hence μ_1 will be capturing the added unexplained between court variability present in the after riots scenario. The approximated degree of inconsistency can be measured using the intra-cluster correlation (ICC), which is defined as the ratio between unexplained level-2 variability against the overall model's (level-2 plus level-1) unexplained variability. Here, the ICC can be interpreted as the proportion of unexplained variability - after controlling for a set of thirteen aggravating and mitigating factors, $\beta_l x_{lij}$, and the average custodial rate before (α) and after ($\alpha + \beta_1 x_{1ij}$) the riots – that can be attributed to differences in severity between courts. Note as well how the ICC will vary if the variance of the random coefficient, $\sigma_{\mu_1}^2$, is found statistically significant, in which case, the ICC for cases sentenced before the riots will be defined as

$$ICC = (\sigma_{\mu_0}^2) / (\sigma_{\mu_0}^2 + \sigma_{\varepsilon}^2)$$

whereas the ICC for cases sentenced in the after scenario will take the following form,

$$ICC = (\sigma_{\mu_0}^2 + \sigma_{\mu_1}^2) / (\sigma_{\mu_0}^2 + \sigma_{\mu_1}^2 + \sigma_{\varepsilon}^2)$$

Results from the model are presented in Table 2. All the aggravating and mitigating factors show the expected sign (positive for aggravating, negative for mitigating factors), except for the variable indicating whether the offender comes from a difficult background, which was not significant. After controlling for all the legal factors included in the model the coefficient for riot (β_1) was not found significant. This was not the case for the variance of its random coefficient ($\sigma_{\mu_1}^2$) where the difference of -2log-likelihoods between the model presented here and a simpler random intercepts model was tested¹⁰ and found significant $P(\chi^2_{(1)} = 13.1) < .001$.

Once established that $\sigma_{\mu_1}^2$ is statistically significant it is possible to calculate the intra-cluster correlation in the model (ICC), which increased from 3.2% in the before riots period to 24.3% in the after period. This change indicates that the between-court unexplained variability went up after the riots took place; or put it differently, the differences in sentencing practices for cases of commercial burglary increased after the riots. This is a result that could be anticipated from Figure 2, where it was observed that some of the courts processing riot-related offences increased their severity while courts that had not processed such cases did not. The validity of the findings obtained from this model is, however, superior to those noted from Figure 2 in two important ways. First Figure 2 only compares results from 12 courts, whereas in the multilevel model 67 of the 76 court locations can be included. Second, whereas before the overall between-court variability was compared using the standard deviations of the custodial rates selected, now the comparison is based on the unexplained variability between courts after controlling for a set of 15 legal factors defining cases of burglary.

Insert Table 2 here

The measures of consistency obtained from the ICCs are not perfectly valid since there might be relevant differences between cases that have not been controlled for in the model. It was not possible to control for the aggravating factor of being involved in the riots since this was not identified in the CCSS questionnaires used in 2011. That is, it is likely that the between-court variability captured by the model is not due to differences in the way similar offences are sentenced across courts, but to differences in the distribution of more or less serious cases across courts. For that reason the measures of consistency provided by the ICCs are bound to be biased upwards. Having said this, it is worth noting not only the substantial increase of more than 20 percentage points between the two ICCs, but also the fact that the ICC referring to the before riots period laid at an extremely low level, 3.2%. Since this figure is so small, the presence of any upward bias should also be relatively meaningless, hence, it is possible to claim that this particular measure of consistency is reasonably robust. On a more substantive note, it is worth noting how consistently offences of commercial burglary were sentenced in the Crown Court in the first half of 2011, and how the summer riots appear to have changed this pattern of consistency.

Before discussing the implications of the findings, namely an increase in both severity and variability in sentencing following the 2011 summer riots, these are summarised graphically in Figure 4. Results from the multilevel model have been used to plot the estimated custodial rates¹¹ before and after the riots for each of the 67 courts included. The black bars, representing the before period, are relatively uniformly distributed, while the white bars, representing the after period, are on average higher, especially so in those courts that processed riot-related cases.

Insert Figure 4 here

Other Riot-Related Effects on Sentencing Trends

Another important issue concerns the role of prior convictions. According to s. 143(2) of the CJA 2003, previous convictions should aggravate the sentence imposed, unless it would be unreasonable to do so. Prior convictions are located at Step Two of the Council's Burglary guideline. One of the features of the riots was the high number of people participating; this fact alone suggests that most would not have relevant prior convictions. In addition, the spontaneous and opportunistic nature of most of the commercial burglaries that took place suggests that members of the general public (rather than known offenders) allowed themselves to be drawn into events.

The absence of prior convictions constitutes one of the most powerful mitigating factors at sentencing (Ashworth, 2015, p178). This is true in all common law jurisdictions; first offenders are deemed less culpable and are empirically less likely to re-offend than recidivists (Roberts, 2010). First-time offenders should receive a more lenient sentence, even those committed during a period of social disorder. What role did this variable play in sentencing the rioters? Two important findings emerge. First, consistent with the observation that many normally law-abiding people were tempted by events to commit a crime, a significantly higher

percentage of offenders in the post-riot scenario had no prior convictions (see Table 3 below). Second, consistent with the criticism that when sentencing the ‘rioters’ courts were less sensitive to mitigating factors, first offenders were significantly more likely to be sent to prison in the post-riot scenario. Less than half (45%) of the commercial burglaries involving first offenders in the pre-riot period were imprisoned, but approximately two-thirds (67%) of the first offenders in the post riots period. This is evidence of the riot context overwhelming an important aggravating factor.

Further evidence that previous good character assumed far less importance during the riots comes from more fine grained analyses involving the mitigating factors captured by the CCSS form. It will be recalled that courts complete the form after sentencing, noting all the guideline factors taken into account. This being the case, it is possible to model the impact of specific factors on the sentence outcome. An important (and common) mitigating factor is ‘offence out of character’. The CCSS found that this factor appeared frequently in the factors cited by courts for all offences, including burglary (Sentencing Council, 2013, Table 1.55). A pre-post riots group comparison revealed that, consistent with the previous convictions analysis, previous good character carried less weight in the post-riots cases. The probability of receiving a custodial sentence for the reference case of an individual sentenced to commercial burglary with no aggravating or mitigating factors other than showing good character fell from .53 to .46 in the post-riot period.

Discussion and Conclusions

A new era of sentencing in England and Wales began in 2010 with the creation of the Sentencing Council, responsible for promoting transparency and public confidence in sentencing. The 2011 summer disorder represented an unexpected challenge soon after the Council was created. As this study shows, there was a significant increase in the custody rate in the post-riot sentences. For example, after controlling for a range of legal factors, the probability of being sent to prison for commercial burglary if sentenced at Manchester Crown Square rose from 46.8% to 84.3%. Indeed in Manchester Judge Gilbert QC had set a precedent for riot-related offending by setting out higher starting points for riot related offending, which influenced sentencing practice in other locations (Lightowlers and Quirk, 2015). In contrast, the probability of being sentenced in other areas remained stable. For example, in Norwich it declined slightly from 48.8% to 45.2%. This corresponds with the fact that, courts were working under great pressure at the time and made it clear that they saw their role as being to pass enhanced sentences to reinforce notions of punishment and deterrence.

The emphasis on punishment and particularly deterrence was endorsed by the Court of Appeal. In the first important judgment (*R. v. Blackshaw*), the Court noted that: “the imposition of severe sentences, intended to provide both punishment and deterrence, must follow.” (para 4). And, given that the Sentencing Council had not issued any guidance in relation to offences taking place as part of wider public disorder, the Court concluded that sentences beyond the range in the guidelines for conventional offending (i.e. offending which lacked the aggravating features of widespread public disorder common to these appeals) were not only appropriate but “inevitable” (Court of Appeal, 2012:23).

These findings are relevant for many other jurisdictions that have experienced urban disorders in recent years, including Athens (in 2008); Montreal (2009);

Stockholm (2013) Ferguson (2014), and Baltimore (2015). Criminal justice responses to such events are important as they shape penal policy and may affect the credibility of the criminal justice system. Despite the argument advanced by the Recorder of Manchester that offending in this context was “*completely outside the usual context of criminality*” (R. v. Carter 2011), the events of 2011 were not without precedent. After all, riots had erupted in Bradford and other mill towns in England only ten years previously (2001).

Fair Notice, Proportionality and Deterrence

There is a ‘fair notice’ problem arising from the sharp uplift in severity. The punitive surcharge was effectively applied retrospectively, representing a violation to the principle of legal certainty. Offenders taking advantage of the social disorder to steal from a ransacked shop, for example, would not have known that their misconduct would carry such a severity premium. The sentences were imposed to promote general deterrence – to inhibit future generations from profiting from a period of urban disorder. Research by Bell et al. (2014) revealed a short-term reduction in crime in London following the riot sentencing. It is unclear whether this reflects a general deterrent effect due to the severity uplift, or whether the drop in London crime was a result of other factors. It is also important to recall that the significant severity premium was not imposed in order to deter a range of crimes such as burglary, theft, handling and assault (the offences examined in the Bell et al. (2014) study) but rather to deter the specific criminal conduct of offending during a period of social disorder. To know whether sentences following the outburst of the riots have achieved that effect requires another empirical test: another riot, in fact. It seems unlikely that in the future young people contemplating crimes such as those that were committed in the summer of 2011 are going to recall the harsher sentences imposed, and be deterred thereby. In this sense the punitive uplift came too late to prevent the 2011 offenders from offending, and too early to deter future potential offenders.

In addition, the increase in severity arguably undermined the principle of offence-based proportionality. For example, the probability of being sent to prison for an offence of commercial burglary if sentenced in Wood Green was 90.2%, approximately the same custody rate for a much more serious offence, namely manslaughter (91.8%; CCSS 2011). When a less serious offence attracts a more severe sentence, this constitutes a violation of the principle of offence-based ordinal proportionality (see Ashworth, 2015). Committing the offence during a time of social disorder is a legitimate aggravating factor at sentencing, well established in sentencing law (Thomas, 2012)¹². However, when an aggravating factor carries this much weight at sentencing, the clarity of a proportional sentence is lost. Proportionality involves calibrating the severity of sentence to the seriousness of the offence. Ordinal proportionality requires offences to be ranked in terms of their relative seriousness (von Hirsch, 1995). Assigning excessive weight to an aggravating factor results in a crime (commercial burglary) leapfrogging over more serious offences in terms of the severity of punishments – in direct violation of ordinal proportionality. This seems to have occurred in the riot cases. For example, one defendant convicted of nondomestic burglary having stolen a camera worth less than £300 from a shop in Manchester. This individual pleaded guilty, had no prior convictions, and had accepted full responsibility for the offence. Under the sentencing guideline in effect at the time, the sentencing range for ‘burglary involving goods

valued at less than £2,000' ran from a fine to 6 months in custody. The sentence imposed at the trial court and upheld on appeal was 20 months imprisonment.¹³

The undermining of well-established sentencing principles such as proportionality may affect trust in the administration of justice. A perceived lack of legitimacy in the criminal justice system that is often an underlying cause of public riots: in this instance diminished confidence and mistrust in the police was evident before the riots occurred (Hohl et al. 2012; Lewis et al. 2011). Public opinion research conducted after the riots suggested that while the public was very concerned about the riots, there was less support for a punitive sentencing response than many had expected. Thus Roberts et al. (2013) provided members of the public with actual cases from the riots and asked them to sentence the offenders described. The researchers found that while people perceived the social disorder as a legitimate aggravating factor, the punitive 'uplift' in the public sentences was far more modest than that which had been imposed by the courts.

Deterrence and the Purposes of Sentencing

Sentencing the rioters exposes a clear tension between competing sentencing philosophies. The punitive surge which occurred in 2011 in response to the public disorder was only possible because of Section 142 of the Criminal Justice Act 2003, which enumerates six sentencing objectives, including deterrence. Tension arises when one objective (deterrence) trumps another important element of sentencing (proportionality). The principle of proportionality underpins sentencing in all common law jurisdictions, including England and Wales. It is codified in many countries and also attracts widespread public support. This principle requires a correspondence between crime seriousness and culpability on the one hand, and sentence severity, on the other. If a very severe sentence is imposed in order to achieve deterrence, proportionality is undermined. Proportionality therefore places limits on the degree to which sentence severity may be enhanced to achieve deterrence. As we have seen (see results), the uplift in custodial sentences imposed in cases in the post-riot period was disproportionate relative to the gravity of the offending and the culpability of the offender.

There is a second reason why courts should be wary of imposing heavy sentences in the pursuit of general deterrence. A great deal of empirical literature has demonstrated that more severe sentencing has little deterrent effect on potential offenders (e.g., Bottoms and von Hirsch, 2010; Webster and Doob, 2012; for a review, Ashworth, 2015, pp. 83-88). In light of the near-universal appeal of proportionality, and the absence of systematic evidence that severe sentencing deters offenders, there is a clear need to curb a tendency to aggravate severity in the way seen in sentencing practices following the riots. Even if one accepts the need for a strong deterrent message, it is also necessary to demonstrate that a striking increase in severity will actually achieve the desired result in terms of crime prevention.

Study Limitations

Of course there are a number of limitations associated with the approach adopted here. One of the potential outcomes of not having been able to identify riot related case precisely and having had to rely on a "broad-brush" approach based on pre and post-riot group comparisons was the possibility of committing a type I error.

This scenario is unlikely since both changes in severity and consistency were detected. On the other hand, as anticipated in the Data section, the possibility of committing a type II error (that is, wrongly attributing the observed effect to an event other than the riots) could be constrained given our conscious choice to focus the analysis on cases of commercial burglary.

Perhaps a bigger threat is posed from the rate of non-response affecting the survey, and specifically, from the possibility that this process is not entirely at random. The Sentencing Council (2012) indicates that the response rate varies widely across Crown Court locations, ranging from 20% to 95%. This variability could affect the validity of the findings presented here. For example, one might argue that judges passing harsher sentences on riot-related cases were making a greater effort at completing their questionnaires given the increased spotlight that they received in the aftermath of the riots. This hypothesis has however been refuted by the Sentencing Council which drew upon Ministry data to test the relationship between the sentence outcome and the probability of cases being missing and found it non-significant. Hence, it seems that the problem of non-response is mainly one of a reduced sample size, and not so much one of selection bias that could jeopardised the validity and generalisability of the findings presented here.

Implications for sentencing

Our findings highlight the need for adequate resource and oversight of judicial processes following large-scale disorder and rioting. Bodies responsible for guiding courts (such as the Sentencing Council and the Court of Appeal), ought to pay particular attention to judicial processes at such times and take the lead in promoting consistent practice. The Sentencing Council may also need to carefully reflect on its potential role as a “circuit breaker” preventing “punitive surges” at times of increased criminality given the potential threat to proportionality arising from short-term punitive surges. In light of the stark impact identified here, research into the lasting legacy of the riots on sentencing practices beyond 2011 should be further explored in the future.

The resulting lack of transparency contradicts the very spirit in which the sentencing guidelines were introduced in England and Wales. These guidelines were created to structure judicial discretion and promote greater consistency in sentencing. Whilst the guidelines provide discretion to move outside of the category range prescribed for a particular offence (for example, where multiple aggravating or mitigating factors exist), “*frequent movement out of a category range would undermine the integrity of the guidelines*” (Ashworth and Roberts, 2013:7). Indeed, since the Coroners and Justice Act 2009, judges must follow these guidelines, only disregarding them where their application is believed to be “*contrary to the interests of justice*” (s. 128(1)(a)). The Coroners Act also created the Sentencing Council (in 2010). At that time no one could have anticipated what was to come only a year after. The occurrence of the riots and the challenge they posed to the vision of a more structured, objective, and transparent sentencing practice in England and Wales was clearly inopportune.

After the riots the Sentencing Council released a revised guideline for sentencing burglary offences (2011). This guideline sets out that offending in the context of public disorder is a factor indicating greater harm, thus increasing the

sentence length/severity. However, it applies only to offenders aged 18 and over, who are sentenced on or after the 16 January 2012. This factor has to date only been into the Burglary Guideline, and not to guidelines relating to other types of offending. It will be, however, be important for the Sentencing Council to monitor how this factor is used in sentencing practice in the future.

Coda: The path not taken

Although it takes us beyond the remit of this paper, a final comment upon the penal response to the riots is in order. The criminal justice system laid great emphasis on deterrence, and as a result, harsher punishment. It is worth considering whether a more restorative approach may ultimately have been more productive. The widespread public anger directed at the rioters was largely focused on the relative small number of very serious cases involving violence or the destruction of shops. As noted earlier, when presented with specific cases more typical of the average defendant, members of the public were less punitive than the courts.

Most riot cases involved defendants who were convicted of commercial burglary of an opportunistic nature. One specific alternative to immediate imprisonment in such cases would have involved imposing suspended sentence orders or tough, community-based restorative disposals. The latter may have contributed to the rebuilding of communities, rather than simply serving as a threat to future rioters. Of the riot-related cases however, immediate custody was seven times more likely than a suspended sentence order (Ministry of Justice, 2012, Table 1.2). It is unclear why suspended sentences, often imposed for relatively serious crimes but where the offender poses no real threat to the community, were not used more often in riot cases.

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Table 1**Guideline Recommended sentences for burglary in a building other than a dwelling***

Type/nature of activity	Starting point	Range
Burglary involving goods valued at £20,000 or more	2 years of custody	12 months – 7 years custody
Burglary involving goods valued at £2,000 or more but less than £20,000	18 weeks of custody	Community order (HIGH) – 12 months custody
Burglary involving goods valued at less than £2,000	Community order (MEDIUM)	Fine – 26 weeks custody

*Source: 2008 Theft and Burglary Sentencing Guideline, p. 19.

Table 2**Pre-Post Analyses of Sentencing Patterns**

	Pre-Riot Period	Riot Period	Difference
<i>Courts processing riot cases</i>			
Commercial Burglary	55.2%	81.1%	+ 26%
Domestic Burglary	73.5%	78.4%	+ 5%
Robbery	83.8%	80.5%	- 3.3%
<i>Courts unaffected by riots</i>			
Commercial Burglary	63.9%	60.3%	-3.6%
Domestic Burglary	74.6%	77.6%	+3.0%
Robbery	85.1%	84.6%	-.5%

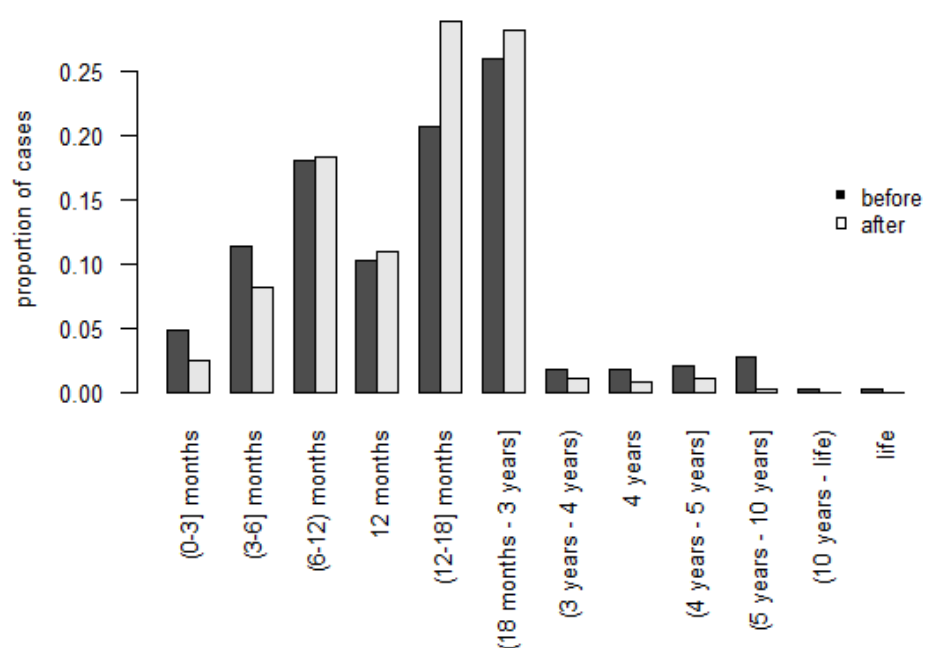
Table 3
Results from the multilevel model*

Level-1 units	1,384		
Level-2 units	67		
-2Log-likelihood	-665.9		
	Coefficient	P-value	
Random effects			
Lever-1 variance	.11 (.33)		
Level-2 variance	.95 (.97)		
Fixed effects			
Intercept	1.17 (.21)	<.001	
Riot	.29 (.20)	.159	
<u>Previous convictions</u>			
None	-1.23 (.22)	<.001	
1-3	-1.09 (.23)	<.001	
4-9	.20 (.28)	.472	
≥10 (ref. category)			
<u>Aggravating factors</u>			
Influence	.47 (.24)	.048	
Bail	1.64 (.25)	<.001	
>1 victim	1.28 (.35)	<.001	
Vulnerable	.80 (.38)	.034	
Value	1.10 (.22)	<.001	
<u>Mitigating factors</u>			
Age	-.44 (.19)	.019	
Remorse	-.37 (.19)	.049	
Needs	-2.25 (.26)	<.001	
Illness	-1.90 (.38)	<.001	
Background	.48 (.29)	.099	
Good character	-.90 (.27)	.001	
Dependency	-1.81 (.54)	.001	

*In brackets the standard errors of the fixed effects and standard deviations of the random effects.

Figure 1

Distribution of bands of sentence length before and after the riots

**Figure 2**

**Proportion of custodial sentences across 2011,
Commercial Burglary and Robbery**

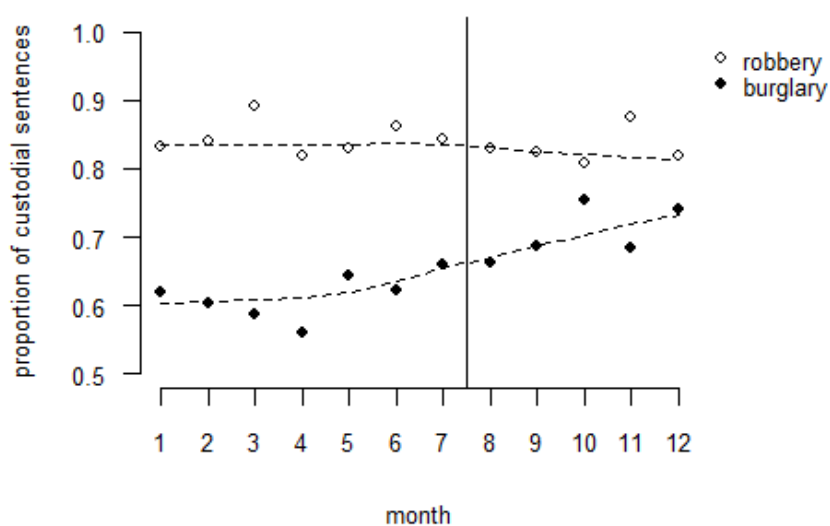


Figure 3

Custodial Rate Commercial burglary, before and after the riots

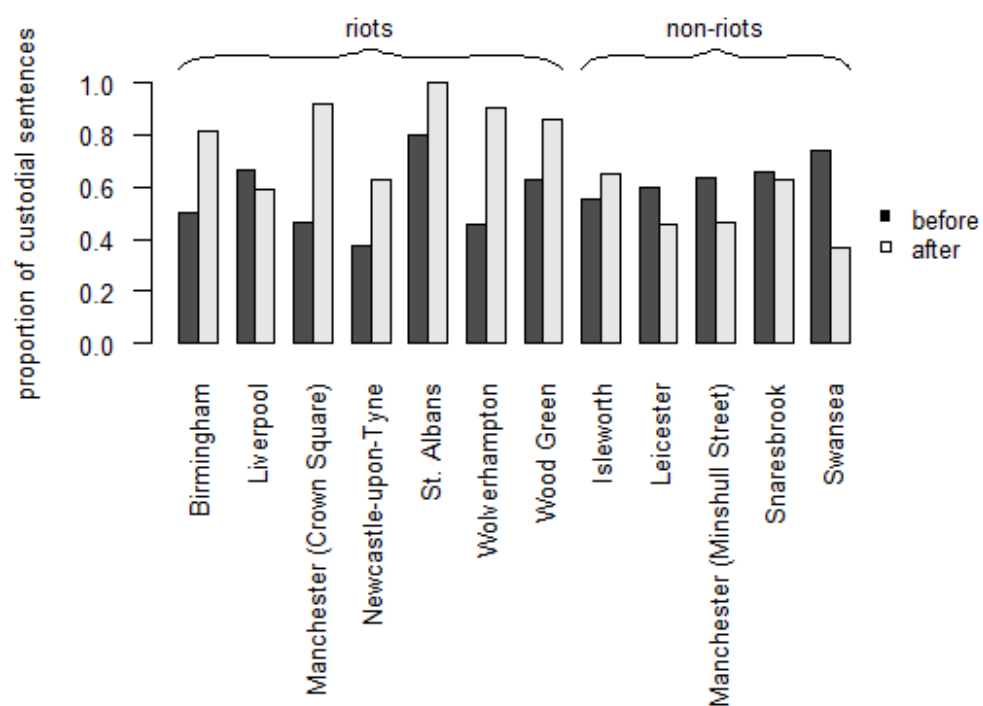
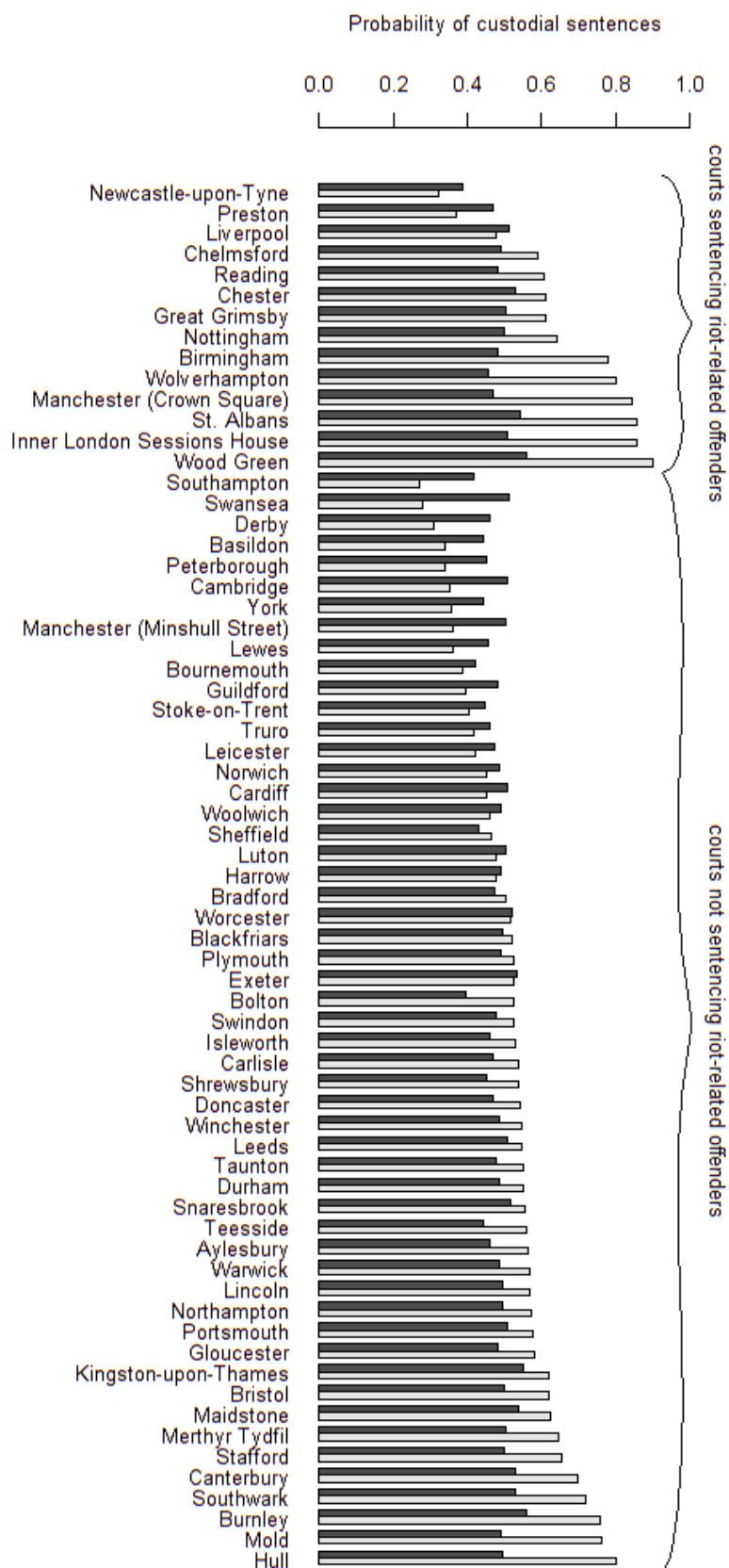


Figure 4

Custody Rates by court, before and after the



Notes

¹ For brevity we use the word ‘riot’, but ‘social disorder’ might be a better term. Events over the period in question included extremely violent rioting as well as much casual scavenging, opportunistic looting, and far less serious forms of offending. The vast majority of offences and offenders fell into the latter category of seriousness.

² Mr. Duggan had been killed by police officers who believed he was in possession of a firearm at the time.

³ In guidance issued on 15 August 2011, the Crown Prosecution Service (2011) stated that: “*The serious overall impact of the disorder in August 2011 has been such that prosecution will be in the public interest in all but the most exceptional of circumstances*”.

⁴ Furthermore, in a second round of anonymisation, the variable capturing the court identifiers for each offence were removed from the published version of the dataset. This represents an important loss of information since it eliminates the hierarchical structure of the dataset, preventing the possibility of analysing any type of geographical variability.

⁵ “The offences for which people were most commonly brought before the court were burglary (50 per cent), violent disorder (22 per cent) and theft (15 per cent). The remaining offences covered small numbers of a wide range of offences.” (Ministry of Justice 2012b:4).

⁶ The exception being Liverpool.

⁷ It would have been interesting to carry out a similar comparison in terms of custodial sentence length but the fact that this variable was interval-censored, combined with the relatively low sample size, makes comparisons across courts highly unreliable.

⁸ The alternative of modelling the sentence length is not considered since it would mean dropping the 479 non-custodial cases registered.

⁹ The estimation of such model was performed using maximum likelihood based on the Laplace approximation, which is coded in the R package lme4. To facilitate convergence of the model the sample was restricted to offences of burglary other than a dwelling from courts where at least five such offences were recorded in 2011. This constraint reduced the number of courts (level-2 units) in our sample from 76 to 67 and the number of sentences (level-1 units) from 1,405 to 1,384.

¹⁰ A similar test was performed to explore the possibility of adding an additional term in the model capturing the covariance between $\sigma_{\mu_0}^2$ and $\sigma_{\mu_1}^2$, however, since it was not significant, $P(\chi^2_{(1)} = 1.9) = .11$ we decided to keep the simpler model presented here.

¹¹ The reference case used in the estimation of the custodial rates is a case of burglary other than a dwelling with no aggravating or mitigating factors other than the offender having been found guilty of ten or more relevant offences in the past.

¹² Thomas (2012) noted that ‘the principle that an offence committed in the context of public disorder is more serious than the same offence would be if committed in isolation... this principle has been stated and restated over the last 40 years’ (p. 62). While this may be true, there remains the difficult decision regarding the degree to which sentences should change, and courts should not lose sight of the importance of individualisation. The culpability of offenders convicted of riot-related offences will vary greatly, even if they share some enhanced liability for the circumstances surrounding their crimes.

¹³ Vanasco, R. v. Blacksaw and Others (2011) [2011] EWCA Crim 2312.